

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
JOHN O'DONNELL AND ROSEMARY DEBELLIS : DETERMINATION
for Revision of a Determination or for Refund of : DTA NO. 820561
Mortgage Recording Tax under Article 11 of the Tax :
Law with Reference to an Instrument Recorded on :
July 4, 2004. :
:

Petitioners, John O'Donnell and Rosemary DeBellis, 640 West End Avenue, Apt. 4-A, New York, New York 10024, filed a petition for revision of a determination or for refund of mortgage recording tax under Article 11 of the Tax Law with reference to an instrument recorded on July 4, 2004.

On October 23, 2005 and November 2, 2005, respectively, petitioners, appearing *pro se*, and the Division of Taxation appearing by Mark F. Volk, Esq. (Michelle M. Helm, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documents and briefs to be submitted by April 6, 2006, which date commenced the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly denied petitioners' claim for refund of mortgage recording tax.

FINDINGS OF FACT

1. On October 15, 2003, petitioners, John O'Donnell and Rosemary DeBellis, completed their purchase of an individual residential condominium unit, Unit 4A, located at 640 West End Avenue, New York, New York. At the closing of title on October 15, 2003, petitioners, as borrowers, executed a Note in the original principal amount of \$516,000.00 and a mortgage with a Condominium Rider and an Adjustable Rate Rider in favor of Washington Mutual Bank, FA, a federal association, located in Stockton, California ("Washington Mutual"). The Note and Mortgage was secured by a mortgage on condominium unit 4A, 640 West End Avenue, New York, New York. The Adjustable Rate Rider executed by petitioners on October 15, 2003 provided for a negative amortization principal balance cap of 125% of the original amount borrowed or \$645,000.00.¹ Based upon a negative amortization principal balance cap of 125% or \$645,000.00, petitioners paid a mortgage recording tax of \$12,068.75 at the closing of title on October 15, 2003.

¹ A negative amortization cap is the maximum amount of negative amortization permitted on an adjustable rate mortgage, usually expressed as a percentage of the original loan amount (e.g., 125%). Negative amortization arises when the mortgage payment is smaller than the interest due on the loan which causes the loan balance to increase rather than decrease.

2. On October 24, 2003, the “Recording and Endorsement Cover Page”² was prepared for presentation by First American New York Office, on behalf of Washington Mutual, along with the mortgage to the City Register of the City of New York. The Recording and Endorsement Cover Page of the mortgage listed the mortgage amount as \$516,000.00 and the taxable mortgage amount as \$645,000.00. The mortgage was recorded on July 4, 2004 in the office of the City Register of the City of New York (i.e., the recording officer of New York County) and mortgage recording tax in the sum of \$13,681.25 was paid.³

3. By letter dated November 12, 2003, Washington Mutual notified petitioners that a review of their loan file revealed that an incorrect negative amortization principal balance cap value was stated in their note and mortgage documents. In this letter, Washington Mutual also requested that petitioners “sign, initial and notarize” the enclosed Modification Agreement, which reflected “the correct Negative Am Principal Cap value as 110% [of the original mortgage amount] or \$567,600.00,” and then return the executed mortgage modification to Washington Mutual for further processing. After signing the Modification Agreement in front of a notary on

² The Recording and Endorsement Cover Page becomes part of the mortgage and is relied upon by the City Register of the City of New York for purposes of indexing the mortgage.

³ The mortgage recording tax paid to the City Register of the City of New York included \$1,612.50 paid by the lender (i.e., .25% of \$645,000.00).

December 13, 2003, petitioners returned it to Washington Mutual. By letter dated October 29, 2004, Washington Mutual informed petitioners that it was unable to provide them with a recorded copy of the Modification Agreement.

4. On February 17, 2005, the Division of Taxation (the "Division") received a Mortgage Recording Tax Claim for Refund wherein petitioners requested a refund of \$1,451.25. In that refund claim, petitioners asserted that they paid mortgage recording tax based upon mortgage documents prepared by Washington Mutual which set forth the negative amortization principal balance cap value as 125% of the outstanding balance, i.e., 125% of \$516,000.00 or \$645,000.00. However, they claimed that, subsequent to the closing of title on October 15, 2003, Washington Mutual discovered that the mortgage documents incorrectly set forth the negative amortization principal balance cap value as 125% of the mortgage amount, rather than as 110% of the mortgage amount, i.e., 110% of \$516,000.00 or \$567,600.00 and, as a result, the bank requested that petitioners execute a mortgage Modification Agreement which reflected that correction in the negative amortization principal balance cap value. They further claimed that they executed the Modification Agreement on December 13, 2003 and returned it to Washington Mutual. They asserted that the refund requested was the difference between the mortgage recording tax which they paid at the time of the closing on October 15, 2003 (\$12,068.75) and what should have been paid (\$10,617.50) if the original mortgage documents had reflected the correct negative amortization principal balance cap value as 110% of \$516,000.00 or \$567,600.00.

5. By letter dated March 5, 2005, the Division denied petitioners' claim for refund in full for the following reasons:

Section 253 of the Tax Law imposes tax based upon the principal debt or obligation which is, or under any contingency, may be secured at the date of

execution thereof, or at any time thereafter. The fact that the face amount of the mortgage may have never been funded by the mortgagee does not alter or eliminate the fact that the mortgage tax is due upon the recording of a mortgage. Tax is imposed on the privilege of recording a mortgage; it is not a tax imposed on the privilege of lending money.

Section 263 of the New York State Tax Law governs the processing of mortgage recording tax refunds. Pursuant to this section, refunds may be granted under the following circumstances: (1) whenever a duly verified application for a refund of mortgage tax erroneously paid is made to the commissioner of taxation and finance and (2) where a discharge has been recorded in the case of a mortgagor exercising a statutory right of rescission in accordance with Section 257-a of the article.

We do not believe that the tax was erroneously paid within the meaning of Section 263. Rather, it was paid in the usual manner, upon the recording of the mortgage.

6. The record does not include any information to indicate that the Modification Agreement has been recorded in the office of the City Register of the City of New York.

CONCLUSIONS OF LAW

A. Tax Law § 263(1)(a) provides, in pertinent part, that “whenever a duly verified application for a refund of mortgage taxes erroneously paid is made to the commissioner of taxation and finance . . . it shall be the duty of such commissioner . . . to determine the amount that has been so [erroneously] paid” In the instant matter, petitioners, as part of their purchase of a residential condominium unit, executed a note in the original principal amount of \$516,000.00 and a mortgage with a negative amortization principal balance cap of 125% of the original amount

borrowed or \$645,000.00 on October 15, 2003. Based upon a negative amortization principal balance cap of \$645,000.00, petitioners paid a mortgage recording tax of \$12,068.75 at the closing of title on October 15, 2003. The note and mortgage executed by petitioners on October 15, 2003 and the Recording and Endorsement Cover Page, required by the City Register of the City of New York, were recorded on July 4, 2004 in the office of the City Register of the City of New York (i.e., the recording officer of New York County). At that time, a mortgage recording tax in the sum of \$13,681.25, consisting of \$12,068.75 paid by petitioners plus \$1,612.50 paid by Washington Mutual, was imposed and paid. Petitioners contend that the terms of the recorded mortgage documents contain errors and do not accurately reflect the actual terms of the agreement between the mortgagors and the mortgagee, Washington Mutual. They maintain that pursuant to the terms of their agreement with Washington Mutual, the actual maximum amount of principal debt secured by the mortgage in the event of any contingency is \$576,600.00, i.e., 110% of \$516,000.00, not \$645,000.00, i.e., 125% of \$516,000.00. Petitioners assert that it is the agreement between the parties which determines the maximum amount of debt secured by the mortgage, not the recorded documents. Therefore, petitioners request a refund of \$1,451.25, the amount of mortgage

recording tax which they claim was overpaid at the time of recordation of the mortgage on July 4, 2004.

B. Petitioners' contention that they overpaid the mortgage recording tax due because the terms of their mortgage actually limited the maximum amount of debt secured by the mortgage in the event of any contingency to \$567,600.00 (110% of \$516,000.00) is without merit. Tax Law §§ 253 and 253-a impose a tax on mortgages.⁴ The tax is based upon the amount of the principal debt or obligation which is, or under any contingency, may be secured at the date of the execution of the mortgage or at any time thereafter (**see**, Tax Law § 253[1]). The mortgage recording tax is not a tax on the privilege of lending money but on the privilege of recording a mortgage; the debt is merely the basis for computation of the tax (**see, Matter of S.S. Silberblatt, Inc. v. State Tax Commn.**, 5 NY2d 635, 640, 186 NYS2d 646, 649, **cert denied** 361 US 912, 4 L Ed 2d 183; **Matter of Citibank, N.A. v. State Tax Commn.**, 98 AD2d 929, 470 NYS2d 920, 922). Accordingly, the mortgage recording tax becomes due and payable at the time a mortgage is recorded. In this case, both the note and mortgage, executed on October 15, 2003 and recorded on July 4, 2004,

⁴ Tax Law §§ 253-c, 253-d, 253-e and 253-f also impose such a tax but relate to municipalities and are not at issue in the present matter.

provided for a negative amortization principal balance cap value of 125% of the original amount borrowed or \$645,000.00. Therefore, since the maximum amount of principal debt secured by the mortgage under any contingency was \$645,000.00, it was proper for the City Register to impose and collect mortgage recording tax in the sum of \$13,681.25, i.e., \$12,068.75 from petitioners plus \$1,612.50 from Washington Mutual.

C. As noted above, a refund of the mortgage recording tax is limited to taxes erroneously collected by a recording officer (Tax Law § 263[1][a]).

In the instant matter, the recording officer was presented with an instrument, the October 15, 2003 mortgage, which, by its terms was subject to the imposition of the mortgage recording tax. Since the mortgage presented for recordation provided that the maximum amount of debt secured by the mortgage under any contingency was \$645,000.00, the recording officer was required to compute and collect the mortgage recording tax on that amount and record the instrument (Tax Law § 253[1]; § 257; § 258[1]). At the time of recording, there was no indication that the parties intended the maximum amount of the debt secured by the mortgage under any contingency to be a lesser amount than what was indicated on the face of the mortgage. Since Tax Law § 253 requires a recording officer to

compute the mortgage recording tax on “the maximum of principal indebtedness expressed in the mortgage,” the recording officer had no choice but to take the documents at face value and compute the appropriate tax due based upon the amount of indebtedness expressed in the mortgage (*see, Matter of the Petition of WBVM Associates*, 120 Misc 2d 434, 466 NYS2d 136, 138). The City Register of the City of New York properly imposed and collected the sum of \$13,681.25 in mortgage recording tax from petitioners and Washington Mutual upon recordation of the October 15, 2003 mortgage on July 4, 2004. Accordingly, petitioners are not entitled to a refund of the mortgage recording tax.

D. The petition of John O'Donnell and Rosemary DeBellis is denied, and the Division of Taxation's denial of the refund claim is sustained.

DATED: Troy, New York
October 5, 2006

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE